

July 3, 2019

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Transforming the 2.5 GHz Band*, WT Docket No. 18-120

Dear Ms. Dortch:

We are deeply concerned with the direction of the draft Report and Order¹ (“Draft Order”) released by the Commission in the above-captioned docket and its impact on educational broadband services, particularly for those Americans that remain unconnected today. The Draft Order unreasonably dismisses the robust record documenting the significant benefits of the Educational Broadband Service (EBS)’s unique educational focus, forecloses any opportunity for rural educational institutions to have the same opportunity as their urban peers to obtain licensed spectrum to serve their communities, and threatens the long-term viability of existing educational programs dependent on the EBS leasing model. With over 620 megahertz of spectrum already in commercial hands, the Draft Order offers no reasoned explanation for how commercializing the EBS band will result in the deployment of affordable, high-speed broadband to long underserved rural communities. The Commission is poised to ignore or unreasonably reject recommendations made by the U.S. Department of Education,² members of Congress,³ and major educational and public interest groups including the American Library Association (ALA), the Consortium for School Networking (CoSN), the State Educational Technology Directors Association (SETDA), the National Digital Inclusion Alliance (NDIA), the Schools, Health & Libraries Broadband

¹ See *Transforming the 2.5 GHz Band*, Report and Order, FCC-CIRC1907-XX, WT Docket No. 18-120 (rel. June 19, 2019) (“Draft Order”). Unless otherwise indicated, all comments and letters referenced herein were filed in WT Docket No. 18-120.

² See Letter from Jim Blew, U.S. Department of Education, to Marlene H. Dortch (filed June 7, 2019).

³ See, e.g., Letter from Senator Gary Peters to Chairman Ajit Pai (June 13, 2019), <https://www.peters.senate.gov/imo/media/doc/06%2013%2019%20Letter%20to%20FCC%20re%20EBS.pdf>.

Coalition (SHLB), the Council of Chief State School Officers (CCSSO), and the National Association of State Boards of Education (NASBE).⁴

Among these and other issues, we emphasize two concerns. First, the Draft Order misinterprets section 309(j) of the Communications Act and fails to comply with the Commission's statutory obligations under that provision. The Draft Order asserts a "requirement to use competitive bidding."⁵ But the statute does not require the Commission to assign spectrum licenses by auction in every case.⁶ Although subsection 309(j)(1) of the statute directs the Commission to resolve *mutually exclusive* applications through an auction, the Commission must do so "consistent with the obligations described in paragraph (6)(E)" of that section.⁷ Paragraph (6)(E) makes clear that the Commission has an "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."⁸

As the record reflects, there is ample precedent where the Commission has fulfilled this obligation by thoroughly examining such alternatives and adopting priority and settlement windows⁹—including this very proceeding, in the context of the Tribal Priority Window. But, when it comes to the possibility of allowing rural educators to apply for spectrum, the Draft Order either ignores or cursorily disregards such alternatives for reducing mutual exclusivity¹⁰—falling far short of fulfilling the Commission's statutory obligation. Finally, the Draft Order's related claim that competitive bidding is consistent with its statutory objectives because it will

⁴ See Letter from Larra Clark, ALA, to Marlene H. Dortch (filed May 1, 2019); Comments of CoSN on Proposed Service Rules on the 2.5 GHz Band (filed Aug. 8, 2018); Letter from Candice Dodson, SETDA, and Keith Krueger, CoSN, to Marlene H. Dortch (filed May 15, 2019); Comments of SETDA on Proposed Service Rules on the 2.5 GHz Band (filed Aug. 8, 2018); Comments of the Schools, Health & Libraries Broadband (SHLB) Coalition (filed Aug. 8, 2018); Letter from Carissa Moffat Miller, CCSSO, and Robert Hull, NASBE, to Marlene H. Dortch (filed June 24, 2019).

⁵ Draft Order ¶ 68.

⁶ Indeed, in the Draft Order itself, the Commission is proposing a tribal window that is deliberately constructed to avoid mutual exclusivity, to the extent possible, and assign licenses to applicants without competitive bidding. Draft Order ¶¶ 45-65.

⁷ 47 U.S.C. § 309(j)(1).

⁸ 47 U.S.C. § 309(j)(6)(E).

⁹ See Comments of North American Catholic Educational Programming Foundation and Mobile Beacon at 35 (filed Aug. 8, 2018) ("NACEPF and Mobile Beacon Comments") (summarizing Commission precedent).

¹⁰ See Draft Order ¶ 68.

avoid delays and make the most expeditious use of EBS contradicts the record.¹¹ In fact, the record evidence makes clear that both rationalization of existing license areas as well as educational priority windows are faster ways to accelerate EBS broadband deployment.¹²

More specifically, multiple parties identified rationalization of the current geographic service areas to geographic boundaries as the fastest way to assign licenses in encumbered white space counties. The Draft Order claims that “the process of rationalizing licenses is likely to be complex, time-consuming, and potentially confusing to incumbent and future licensees.”¹³ But this rationale also lacks record support. Nearly every incumbent and prospective licensee addressing the issue supported rationalization.¹⁴ Record evidence also demonstrates that granting licenses to educational entities will accelerate deployment, particularly in rural areas.¹⁵ Indeed, where the Commission has licensed EBS via waivers, licensees have deployed in a matter of weeks.¹⁶

¹¹ Draft Order ¶ 69 (quoting 47 U.S.C. § 309(j)(3)(A)).

¹² See Letter from Jim Goldstein and Gardner Foster, Sprint Corp.; Steve Coran, Wireless Internet Service Providers Association (WISPA); Justin Forde, Midcontinent Communications; Mary O’Connor, Wireless Communications Association International; Ed Lavergne, Catholic Technology Network; Todd Gray, National EBS Association; Stephanie Weiner, Voqal, NACEPF, and Mobile Beacon, to Marlene H. Dortch (filed June 13, 2019) (“Joint Rationalization Ex Parte”); Letter from Katherine Messier, NACEPF and Mobile Beacon, to Marlene H. Dortch (filed April 25, 2019); Letter from Mark Colwell, Voqal, to Marlene H. Dortch (filed May 9, 2019) (“Voqal Rationalization Ex Parte”).

¹³ Draft Order, Appendix B ¶ 19.

¹⁴ See, e.g., Joint Rationalization Ex Parte at 2 (jointly proposing a “fast and fair” rationalization process designed to “accelerate 2.5 GHz deployment and ensure the most intensive use of EBS spectrum.”).

¹⁵ See Reply Comments of North American Catholic Educational Programming Foundation and Mobile Beacon at 19-21 (filed Sept. 7, 2018) (“NACEPF and Mobile Beacon Reply Comments”); Comments of Voqal at 27 (filed Aug. 8, 2018) (“Voqal Comments”); Raul Katz & Fernando Callorda, Schools, Health & Libraries Broadband Coalition, *The Economic Benefit of Keeping the “E” in EBS: A Comparison of Licensing Unassigned EBS to Educators and Nonprofits vs. Commercial Auctions* at 35-38 (filed June 3, 2019) (“Katz Economic Study”).

¹⁶ See, e.g., *Application of the Havasupai Tribe for a New Educational Broadband Service Station*, Memorandum Opinion and Order, DA No. 19-424, File No. 0008189594, ¶ 6 (rel. May 16, 2019) (reporting that the tribal licensee had deployed service within “days” of receiving its 2018 STA, offering speeds up to 32 Mbps).

Second, the Draft Order's decision to adopt an overlay auction is the product of unreasoned decision-making. An auction without competition is irrational and contrary to the Commission's clear statutory obligations. Section 309(j)(3)(B) expressly requires the Commission to devise mechanisms for assigning spectrum that "promot[e] economic opportunity and competition" and "disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."¹⁷ Yet the Draft Order makes no attempt to engage with these statutory requirements. Indeed, the record makes clear that the Commission's hurried decision to conduct an overlay auction will actively undermine these goals.¹⁸

Absent rationalization of existing license areas, the majority of counties subject to the overlay auction are encumbered by existing licenses,¹⁹ most of which are leased to existing commercial operators. The maps below illustrate such encumbered counties. Bidders in the overlay auction for these counties will have primary license rights (and buildout obligations) with respect to only the small, strangely shaped area of white space not covered by existing EBS licensees. Our comments, along with the SHLB economic study authored by Dr. Raul Katz, detail the technical, economic, and auction design challenges of overlay auctions and their impact on the auction mechanism's ability to assign spectrum efficiently in such cases.²⁰

¹⁷ 47 U.S.C. § 309(j)(3)(B).

¹⁸ The lack of auction competition is exacerbated by the Draft Order's proposed band plan and lack of bidding credits, which "would significantly limit auction participation by small providers." Letter from Stephen Coran, WISPA, to Marlene H. Dortch at 3 (filed June 28, 2019).

¹⁹ Voqal Rationalization Ex Parte at 5.

²⁰ See, e.g., NACEPF and Mobile Beacon Comments at 51-53; Voqal Comments at 26; Katz Economic Study at 51-52.

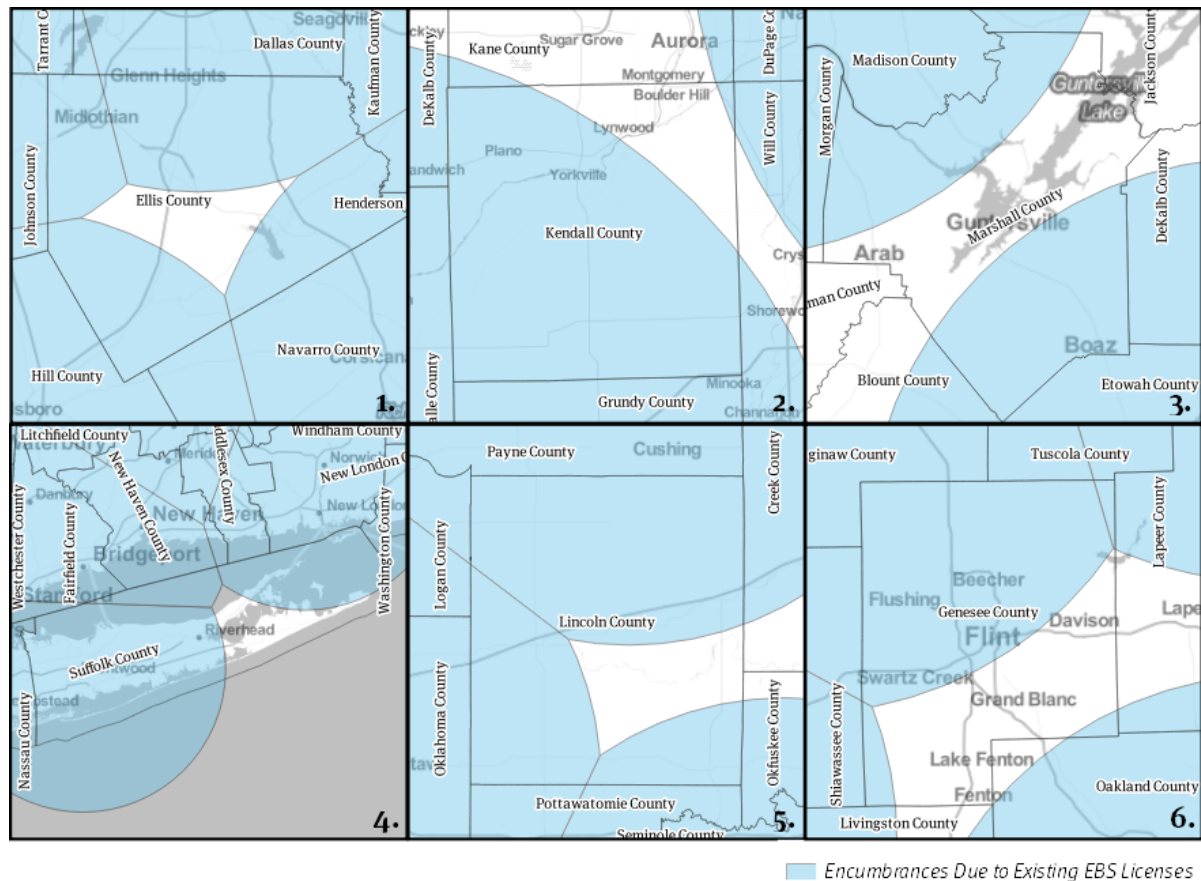


Figure 1—Overlay encumbrances in 1. Ellis County, TX; 2. Kendall County, IL; 3. Marshall County, AL; 4. Suffolk County, NY; 5. Lincoln County, OK; and 6. Genesee County, MI.

In all events, record filings by multiple and diverse parties have pointed out the inevitable result—the existing commercial operator lessee will have a decisive advantage in overcoming the technical and economic complexities to bid for such overlay licenses in such cases.²¹ Missing the point, the Draft Order suggests that the technical complexities are somehow a virtue that will ensure that potential bidders have “consider[ed] carefully” underlay licensees’ interests before deciding to participate.²² That may be true, but the consequence, which the Commission fails to grapple with, is equally true. Where counties are encumbered, the current commercial lessee will enjoy such an overwhelming advantage that other potential licensees will likely decline to participate at all. An auction with a single viable bidder cannot be called an auction; it is a

²¹ See, e.g., NACEPF and Mobile Beacon Reply Comments at 37-38; Reply Comments of Voqal at 33-34 (filed Sept. 7, 2018); Voqal Rationalization Ex Parte at 3-4; Letter from Alex Starr, AT&T Services, Inc., to Marlene H. Dortch at 2 (filed June 28, 2019); Joint Comments of South Florida EBS Licensees at 11 (filed Aug. 8, 2018).

²² Draft Order ¶ 81.

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private sale that conflicts with statutory requirements and achieves none of the intended benefits of competitive bidding.

Sincerely,

A handwritten signature in blue ink, appearing to read "Stephanie Weiner", with a stylized, cursive script.

Stephanie Weiner
Counsel to Voqal, NACEPF, and Mobile Beacon